

# Affirming the Ban on Harsh Interrogation

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*Beginning in 2002, lawyers for the Bush Administration began producing the now infamous legal memoranda on the subject of interrogation. The memoranda advise interrogators that they can torture people without fear of prosecution in connection with the so-called "global war on terror." Much has been and will be written about the expedient and erroneous legal analysis of the memos. One issue at risk of being overlooked, however, because the memos emphasize torture, is that the United States must respect limits far short of torture in conducting interrogations. The United States may not use any form of coercion against persons detained in an armed conflict, nor may it engage in cruel, inhuman and degrading treatment at any time. The great effort of the memo writers to restrict torture to the most extreme conduct imaginable obscures the fact that the United States has wider obligations. Avoiding torture is not enough. Interrogators must also respect the broader restrictions on coercive, cruel, inhuman, and degrading treatment.*

*The ban on coercive interrogation has both moral and pragmatic underpinnings. Despite this, apparently some in the Bush Administration have become persuaded that torture, coercion, cruelty, and abuse can be effective methods of interrogation and that the need for information outweighs the illegality and immorality of using such means. The weight of the evidence, however, is firmly against that position. Forceful interrogation is not as reliable as non-forceful means. The use of such means has likely cost the United States lives. It has begun to involve the United States in litigation around the world, and it has dealt the nation's reputation a blow from which it may take us decades to recover.*

The infamous legal memoranda prepared by Bush Administration lawyers following the events of September 11, 2001, go to great lengths to free American officials from any possible legal restraint in the Administration's so-called "global war on terror."<sup>1</sup> With regard to

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<sup>1</sup> Most of the documents referred to here as the "torture memos" have been gathered in *THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*]. The torture memos mostly consist

interrogating persons detained pursuant to the global war, the memos develop extraordinary definitions for terms such as “torture” and “transfer.” In the contorted world of the memos, inflicting pain is not *torture* unless the pain is as great as that associated with organ failure and death.<sup>2</sup> In the memos, moving someone from one country to another a country, where the detainee is likely to be subjected to torture, is not *transfer* if the move is temporary.<sup>3</sup> The memos also assert that even though torture is absolutely prohibited, the President under his “complete discretion in the exercise of his Commander-in-Chief authority” may authorize anything.<sup>4</sup>

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of legal analysis by lawyers in the Bush White House, Department of Justice, and Department of Defense. They generally argue that the 1949 Geneva Conventions and other international human rights and humanitarian law do not apply to persons in United States detention pursuant to the global war on terror. *Id.* They also present arguments that prosecutions will not result even if interrogators use techniques involving torture, coercion, inhumanity, and abuse. *Id.*; see, in particular, Alberto Gonzales, Memorandum for the President Re: Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS, 118 [hereinafter Gonzales Decision]; Jay S. Bybee, Memorandum for Alberto R. Gonzales Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS 172 [hereinafter Bybee Memorandum]; Letter from John Yoo to Alberto R. Gonzales (Aug. 1, 2002), *reprinted in* THE TORTURE PAPERS 218; Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003), *reprinted in* THE TORTURE PAPERS 286 [hereinafter Working Group Report] (also known as the “Haynes Memorandum”). See also Michiko Kakutani, *Following a Paper Trail to the Roots of Torture*, N.Y. TIMES, Feb. 8, 2005, at E1 (book review).

<sup>2</sup> “Torture,” according to the memos, is an act that inflicts extraordinary pain amounting to that experienced with organ failure or death, or mental suffering that lasts “months or even years.” Bybee Memorandum, *supra* note 1, at 176–77. The memos reject inclusion in the definition of torture such well-known tortures as burning with a cigarette, electric shock, having digits cut off, fingernails pulled out, or needles shoved under fingernails. *Id.* The memos do not explain how anyone knows what the pain associated with death feels like.

<sup>3</sup> 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 “prohibits individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not . . . regardless of their motive.” *Id.*

See Jack Goldsmith, Memorandum for Alberto R. Gonzales Re: Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq (Mar. 19, 2004), *reprinted in* THE TORTURE PAPERS, *supra* note 1, at 367. This memo constructs the argument that “illegal aliens” are not covered by the prohibition, nor are “temporary” transfers. *Id.*

<sup>4</sup> Working Group Report, *supra* note 1, at 302–07.

Much has been and will be written about the expedient and erroneous legal analysis of the memos.<sup>5</sup> One issue at risk of being overlooked, however, because the memos emphasize torture, is that the United States must respect limits far short of torture in the conduct of interrogations. The United States may not use any form of coercion against persons detained in armed conflict, nor may it engage in cruel, inhuman, or degrading treatment at any time.

The great effort of the memo-writers to restrict torture to the most extreme conduct imaginable obscures the fact that the United States has wider obligations. Avoiding torture is not enough. Interrogators must also respect the broader restrictions on coercive, cruel, inhuman, and degrading treatment.<sup>6</sup>

The United States military and United States law enforcement officers know how to interrogate without using coercive or cruel techniques—as do

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<sup>5</sup> Dean Harold Koh, during confirmation hearings for Judge Alberto Gonzales, made this assessment of one early memo that was largely copied in later memos: “[I]n my professional opinion, as a law professor and a law dean, the Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever heard.” Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States before the S. Comm. on the Judiciary, 109th Cong. 1 (2005) (statement of Dean Harold Koh). For a later memo that copies much of the Bybee Memorandum, see the Working Group Report, *supra* note 1, at 286. *Accord* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSN’L L. 811 (2005).

See also the views of two eminent professors of international law regarding the memo-writers’ breach of professional ethics and possible implication in the law violations resulting from their erroneous advice. Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689 (2004). In addition, see the statement by the former Legal Advisor to the State Department of the erroneous positions taken by lawyers at the Justice Department, the White House, and the Pentagon regarding detention law. Jess Bravin, *U.S. Mishandled Prisoner Policy, Ex-Adviser Says*, WALL ST. J., Apr. 5, 2005, at B9.

<sup>6</sup> The main theme of several of the torture memos concerns how much the interrogator can get away with. They particularly focus on what acts might lead to prosecution in the United States. As a result, the torture memos focus to a large extent on what violations of international law have been implemented in United States law. While it is true that international legal obligations implemented in national law may be easier to enforce in national courts than obligations not so implemented, it is a mistake to think that the United States must only respect such obligations. Americans must respect all the international legal obligations binding on the United States, whether in the form of customary international law, treaties, or general principles.

And while it is also true that the legal obligation to enforce the prohibition on torture generally is more emphatic than the obligation to enforce the other obligations discussed here, the United States still has obligations to prevent all of these unlawful forms of interrogation. For a discussion of the obligation to enforce grave breaches of the Geneva Conventions, see *infra* Part III.B.

the military and police of our peer nations. They have done so successfully for decades.<sup>7</sup> So why did the Administration's lawyers work so hard to argue that our interrogators could use coercive and cruel techniques with impunity? We do not yet know the answer, but we can suggest two plausible explanations. First, it may be that the tactics have nothing to do with information-gathering, but rather aim to send a message to other would-be terrorists. Administration officials might have decided to adopt the use of tactics that would terrorize detainees in the hope of deterring potential recruits to terrorism.<sup>8</sup> Or, it may be that some in the Administration have become persuaded that torture, coercion, cruelty, and abuse can be effective methods of interrogation, and that the need for information outweighs the immorality of using such means. Yet the weight of the evidence is firmly against the conclusion that forceful interrogation is as reliable as non-forceful methods. In fact, the evidence on information-gathering supports international law's absolute prohibition on torture, cruelty, and coercion.<sup>9</sup>

Regardless of the reasons for the Administration's lawyers' attempts to create a legal climate in which interrogation techniques involving less than torture could be used, it is imperative to set the legal record straight.<sup>10</sup> Interrogators face restrictions far stricter than a simple ban on torture. This Article reviews those restrictions.

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<sup>7</sup> See *infra* notes 126–30 and accompanying text.

<sup>8</sup> While no firm evidence of a plan to use torture and abuse for deterrence has come to light, plenty of information about the abusive treatment of persons in United States detention has become public, including photos. Cofer Black, the United States counterterrorism coordinator stated that after 9/11 “the gloves came off.” Mark Bowden, *The Dark Art of Interrogation: A Survey of the Landscape of Persuasion*, ATLANTIC MONTHLY, Oct. 1, 2003, at 56.

Apparently there is even a term for torture aimed at deterring terrorists—“terrorist torture.” See Daniel Stetman, *The Question of Absolute Morality Regarding the Prohibition on Torture*, 4 LAW & GOV'T 161, 162 (1997.)

<sup>9</sup> The practical and moral issues raised by coercive interrogation are discussed in Part III, *infra*.

<sup>10</sup> The memos explain why coercive, cruel, inhuman, and degrading treatment is, in the view of the writers, generally available to interrogators. They assert that torture may also be used, but only with the President's authorization or where the interrogator can claim it is necessary. Working Group Report, *supra* note 1, at 302–07. A new Justice Department memo that purportedly “supersedes” the Bybee memo does not reject the asserted right to use coercion and abuse, nor does it state unequivocally that the President may never authorize unlawful methods. See Donald Levin, Memorandum for James B. Comey Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, Dec. 30, 2004, available at <http://www.usdoj.gov/olc/dagmemo.pdf>.

The law relevant to the practice of interrogation is found in two great bodies of international legal principles, in addition to domestic law.<sup>11</sup> During armed conflict and occupation, international humanitarian law (IHL) applies. IHL expressly prohibits not just torture, but any form of coercion of detainees during interrogation. Second, international human rights law applies to persons detained outside of an armed conflict, but also, to a certain extent, to wartime detainees as well. Human rights law prohibits torture as well as cruel, inhuman, and degrading interrogation techniques. These international obligations have been partially implemented in United States domestic law.<sup>12</sup> Even where they have not been implemented, the United States remains bound to respect them.<sup>13</sup>

Yet we now have irrefutable evidence of widespread use of unlawful interrogation techniques by American interrogators in Afghanistan, Iraq, Guantanamo Bay, and at undisclosed locations.<sup>14</sup> The memo-writers have

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<sup>11</sup> This Article takes a classical approach to international law, meaning that it is grounded in both positivism (modified by normative principle) and formalism. It is an approach that stands in marked contrast to the hegemonic approach of the Administration. Compare Detlev Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 844 (2001) with Mary Ellen O'Connell, *Taking Opinio Juris Seriously, A Classical Approach to International Law on the Use of Force*, in INTERNATIONAL CUSTOMARY LAW ON THE USE OF FORCE: A METHODOLOGICAL APPROACH 9 (Enzo Cannizzaro & Paolo Palchetti eds., 2005); Anne Orford, *The Gift of Formalism*, 15 EUR. J. INT'L L. 1, 179 (2004); Mary Ellen O'Connell, *The End of Legitimacy*, 2004 AM. J. INT'L L. 269; James Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT'L L. 121, 129 (2000); Martti Koskeniemi, *The Lady Doth Protest Too Much, Kosovo and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002).

<sup>12</sup> See 18 U.S.C. § 2441 (2000); 18 U.S.C. §§ 2340–2340A (West Supp. 2005).

<sup>13</sup> All international actors are bound by international law. Aspects of a state's domestic law that might put the state into a situation of breach of international law is no defense to the breach. The International Court of Justice has referred to this as a fundamental principle of international law: "[It is a] fundamental principle of international law that international law prevails over domestic law." Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 12, para. 57 (Apr. 26). The United States Supreme Court has confirmed that international law is part of United States law. *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 752 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." The term "international law" is generally used in place of the term "law of nations" today.)

<sup>14</sup> An extraordinary amount of evidence is now available on the use of unlawful interrogation techniques at all detention centers operated by the United States in Afghanistan, Iraq, at Guantanamo Bay, Cuba, and at undisclosed locations since September 11. First, *Time* magazine obtained an interrogator's log from Guantanamo Bay, Cuba. The log details how, in addition to other unlawful treatment, a detainee was

apparently been successful in creating the impression among interrogators that they may do anything to an interrogatee short of intentionally inflicting the pain of organ failure or death. The American Civil Liberties Union summarized FBI e-mails on the treatment of detainees at Guantanamo Bay, Cuba, in the summer of 2004:

[D]etainees were shackled hand and foot in a fetal position on the floor. The agent states that the detainees were kept in that position for 18 to 24 hours at a time and most had "urinated or defecated [sic]" on themselves. On one occasion, the agent reports having seen a detainee left in an unventilated, non-air conditioned room at a temperature "probably well over a hundred

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forcibly given three and one-half bags of intravenous fluid, then forced to urinate on himself. Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME, June 20, 2005, at 26, 30. Second, CIA Director Porter Goss testified in March 2005 that the CIA is currently using lawful interrogation methods. He would not confirm whether this was the case in the recent past, but he added that he considers "waterboarding" a "professional interrogation technique" and, therefore, acceptable. Waterboarding involves tying someone to a board and dunking him underwater to the point he fears he will drown. It is plainly a form of torture. Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1; see also Editorial, *Abuse in Secret*, WASH. POST, Mar. 5, 2005, at A18. Third, communications from FBI agents have confirmed that beating, burning, sexual humiliation, and shackling for twenty-four hours at a time without relief, food, or water have all been used in connection with interrogation at Guantanamo Bay, Cuba. The FBI documents were released to human rights organizations pursuant to a Freedom of Information Act request. American Civil Liberties Union, *Newly Obtained FBI Records Call Defense Department's Methods "Torture," Express Concerns Over "Cover-Up" That May Leave FBI "Holding the Bag" for Abuses*, Dec. 20, 2004, <http://www.aclu.org/news/NewsPrint.cfm?ID=17216&c=206> [hereinafter ACLU]. Fourth, the International Committee of the Red Cross (ICRC) also reported in July 2004 on the use of interrogation techniques "tantamount to torture" at Guantanamo Bay. Demetri Sevastopulo & Frances Williams, *Red Cross Accuses US Over Guantanamo*, IRISH TIMES, Dec. 1, 2004, at 13; Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan. 1, 2005, at A11. Fifth, the ICRC has also reported on the use of techniques "tantamount to torture" against persons thought to have information throughout the United States' Iraqi detention centers. See International Committee of the Red Cross, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (Feb. 2004), reprinted in THE TORTURE PAPERS, *supra* note 1, at 383, 384–85. Finally, Secretary of Defense Donald Rumsfeld, by his own admission, authorized the use of unlawful interrogation techniques at Guantanamo Bay, Cuba during December 2002. He also admitted to the unlawful transfer of persons out of Iraq to undisclosed locations for interrogation by the CIA and other persons known to use torture. See *infra* note 52 and accompanying text. See also MARK DANNER, *TORTURE & TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004); Congressional Testimony of Tom Malinowski, Human Rights Watch, Mar. 18, 2005, available at <http://hrw.org/english/docs/2005/03/18/usint10347.htm>.

degrees.” The agent notes: “The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night.”<sup>15</sup>

The law of interrogation, however, prohibits all of this treatment. It prohibits not only torture, but coercion and cruelty as well. The conclusion here is that the President of the United States may no more authorize the use of coercion and cruelty against detainees than he may authorize torture. The proposal of Harvard Law School Professor Alan Dershowitz for a presidential “torture warrant” is an invitation for the President to violate international law.<sup>16</sup> But so would a warrant to allow coercion or cruelty in interrogation.

To the extent that torture, coercion, and cruelty have already occurred, the perpetrators have committed crimes. Their superiors may also be guilty of criminal wrongdoing if they gave orders or authorized the use of unlawful techniques and knew that a crime would likely result from the order or if they knew of such offenses and did not stop them and report the criminal activity.<sup>17</sup> Nor should reliance on the expedient legal advice contained in the torture memos be a defense.<sup>18</sup> Lawsuits have already begun against the United States and Bush Administration officials in a variety of fora.<sup>19</sup> Civil suits by victims have ample legal basis, but their success will depend on the

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<sup>15</sup> ACLU, *supra* note 14.

<sup>16</sup> See Alan M. Dershowitz, *Stop Winking at Torture and Codify It: U.S. Must Decide Which Interrogation Tactics Are Allowable and Which Aren't*, L.A. TIMES, June 13, 2004, at 5.

<sup>17</sup> Prosecutor v. Timor Blaskic, Case No. IT-95-14-A, Judgment, ¶ 42 (July 29, 2004) (International Criminal Tribunal for the Former Yugoslavia).

<sup>18</sup> This is a complex topic that cannot be developed here beyond one example. The Nuremberg Tribunal did not excuse Germany's high political leaders for invading Norway, Denmark, and the Low Countries despite the fact that the Foreign Minister Joachim von Ribbentrop had personally developed legal justifications for doing so. On the contrary, part of the case against Ribbentrop himself consisted of having developed these expedient legal arguments. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 286 (1947); see also Bilder & Vagts, *supra* note 5, at 694.

<sup>19</sup> See the website of the Center for Constitutional Rights (CCR) for details regarding a request that the German State Prosecutor open a criminal investigation of United States personnel linked to the detainee abuse scandal and for details regarding a civil suit against private contractors for their role in abuse of detainees in Iraq. <http://www.ccr-ny.org/v2/home.asp> [hereinafter CCR]. See the website of Human Rights First or the American Civil Liberties Union for details of a civil suit against Defense Secretary Donald Rumsfeld and former CIA Director George Tenet for abuse of detainees. <http://www.humanrightsfirst.org/index.html>; <http://www.aclu.org>. See also discussion of additional cases, *infra* notes 145–47 and accompanying text.

courage of judges in applying the binding law against the Administration of the world's most powerful nation.<sup>20</sup>

The remainder of this Article examines the wartime ban on coercion, the peacetime ban, and the arguments for ignoring the bans.

## I. THE WARTIME BAN

The law applicable to interrogation during war or armed conflict is part of the larger body of rules called international humanitarian law or IHL.<sup>21</sup> IHL consists of the famous and respected 1949 Geneva Conventions,<sup>22</sup> the 1977 Additional Protocols thereto,<sup>23</sup> the Hague Conventions of 1899 and 1907,<sup>24</sup> several other lesser-known treaties,<sup>25</sup> and principles of customary

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<sup>20</sup> The request by CCR to the German State Prosecutor was initially dismissed apparently in connection with Donald Rumsfeld's attendance at a security conference in Munich. The claimants appealed. CCR, *supra* note 19.

<sup>21</sup> The United States military prefers the term "law of armed conflict" or "LOAC," but the International Committee of the Red Cross, the guardian of this law, uses the term "international humanitarian law," as does the International Court of Justice, the chief legal organ of the United Nations. *See, e.g.,* The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 20, para. 89 (July 9).

<sup>22</sup> The two conventions relevant to this article are Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Prisoner's Convention] and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Civilian's Convention]. Alberto Gonzales, United States Attorney General in the second George W. Bush Administration, called the Conventions "quaint" and "obsolete." Gonzales Decision, *supra* note 1, at 119. He did so just months before the U.S. Secretary of Defense demanded of Saddam Hussein that the Geneva Conventions be respected in detail with regard to United States service personnel captured in the invasion of Iraq. *See, e.g.,* Jamie Fellner, *Prisoners of War in Iraq and at Guantanamo, Double Standards*, INT'L HERALD TRIB., Mar. 31, 2003, at 8; Dawn Walton, *War on Iraq: Prisoners of War: Geneva Conventions, U.S. Infuriated by Footage of PoWs*, GLOBE & MAIL, Mar. 24, 2003, at A5.

<sup>23</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

<sup>24</sup> The most important of the fourteen conventions is the Convention Respecting the Laws and Customs of War on Land (1907 Hague Convention IV), Annex, Oct. 18, 1907, 36 Stat. 2277.

<sup>25</sup> *See, e.g.,* The Convention for the Protection of Cultural Property in the Event of Armed Conflict, Aug. 7, 1956, 249 U.N.T.S. 240.



international law.<sup>26</sup> In an international armed conflict, IHL reflects three categories of individuals relevant to this discussion of interrogation: combatants, civilians, and unlawful combatants.<sup>27</sup> We will consider each of these categories in turn, and then consider the rules prohibiting coercive interrogation with respect to each category. First, however, a few words on Bush Administration assertions that some wartime detainees have *no* legal protections while in detention.

### A. *The Administration's Use and Abuse of IHL*<sup>28</sup>

The extraordinary conclusion by the Administration that some individuals have no right not to be tortured or abused while in detention is simply wrong. It appears to grow out of several other Administration policies that are, in themselves, based on erroneous and sometimes even contradictory legal analyses. First, the Administration has declared that the United States is involved in a global war on terrorism based not on the fact of worldwide hostilities, but rather on the existence of terrorists in many parts of the world.<sup>29</sup> Second, despite this declaration, the Administration applies IHL in its global war only where IHL seems to give it advantages. Where applying IHL entails disadvantages, the Administration argues that it does not apply. For example, the Administration claims the combatant's privilege

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<sup>26</sup> See INT'L COMM. OF THE RED CROSS, I & II CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); see also MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 522–78 (2005).

One of the many erroneous statements in the torture memos is that the executive branch is not bound by customary international law since it is “not Federal law.” Working Group Report, *supra* note 1, at 290. That has never been the official position of the United States. Indeed, it would lead to unending complications and absurd situations because the United States federal government bases so much on customary international law—such as treaty law and maritime claims. At any rate, the Supreme Court stated clearly that customary international law is part of federal common law in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>27</sup> Some authors refer to certain unlawful combatants as “unprivileged belligerents.” See Charles Garraway, *Interoperability and the Atlantic Divide—A Bridge Over Troubled Waters*, 34 IS. YBK. H. R. 105, 107–17 (2004).

<sup>28</sup> Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 LAW & INEQ. 195, 210 (2004) (citing LAWYERS COMM. FOR HUM. RTS., ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 53, 108 (2003)).

<sup>29</sup> Mary Ellen O'Connell, *Ad Hoc War*, in KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 405 (Horst Fischer et al. eds., 2004).

to kill on the battlefield with respect to alleged terrorists wherever they are found. It claims this privilege even outside zones of active hostilities, arguing that all the world is a battlefield.<sup>30</sup> Yet, the Administration does not really behave as though the entire world became a battlefield on September 11, 2001. It surely does not recognize that American military personnel may be targeted everywhere in the world. In addition, the letters it sent to the United Nations Security Council to justify the invasions of Afghanistan and Iraq did not mention a worldwide war.<sup>31</sup> Indeed, if it recognized such a worldwide war, why send letters justifying the use of force in particular locations?

In addition to the combatant's privilege, the Administration apparently intends to detain people indefinitely on the basis of the IHL right to detain combatants until the end of active hostilities without the requirement of a trial.<sup>32</sup> Yet the Administration refuses to extend IHL detainee protections, such as the right to be free from coercion of any kind during interrogation, the right to be visited by the International Committee of the Red Cross, and the right to have detainee status reviewed.<sup>33</sup>

The Administration conveniently overlooks the fact that "combatant" is defined in international law. Such a status cannot simply be declared. A combatant is someone who takes direct part in hostilities.<sup>34</sup> A situation of hostilities is one of intense, inter-group, armed fighting.<sup>35</sup> The rights to kill without warning and to detain until the end of hostilities grow out of these situations, situations too chaotic for the usual criminal law to apply. Not only does IHL simply not apply to criminal activity outside of situations of hostilities, states traditionally resist elevating criminals to the plane of combatants. To do so acknowledges that the military challenge to the state has reached the point of chaos and emergency where the national criminal law can no longer apply. Nevertheless, the Administration has declared that all terrorists are combatants whether the alleged terrorists have been in an

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<sup>30</sup> *Id.* at 405, 415–17.

<sup>31</sup> Letter dated Mar. 20, 2003 from the Permanent Representative of the United States of America to the President of the Security Council, United Nations, UN Doc. S/2003/351 (Mar. 21, 2003); Letter dated Oct. 7, 2001 from the Permanent Representative of the United States of America to the President of the Security Council, United Nations, U.N. Doc. S/2001/946 (Oct. 8, 2001).

<sup>32</sup> *Id.* at 421–25.

<sup>33</sup> See generally Sassòli, *supra* note 28.

<sup>34</sup> *Id.* at 210.

<sup>35</sup> O'Connell, *supra* note 29, at 407–14; see also Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror,"* 857 INT'L REV. RED CROSS 39, 45–46, 52–53 (2005); Christopher Greenwood, *War, Terrorism, and International Law*, 56 CURRENT LEGAL PROBS. 505, 529 (2003).

armed conflict or not.<sup>36</sup> And it has declared that none of these combatants—real or constructed—has a right to IHL protections.<sup>37</sup>

One hardly need respond to these brazen positions. But, in brief, all persons caught up in armed conflict have at least some protection under IHL. State leaders have no discretion to refuse to extend these protections. Persons in non-conflict situations have basic peacetime human rights protections.<sup>38</sup> Again, the core protections are non-derogable. It is simply not the case, as the Administration implies, that any human being can be placed in a situation beyond the reach of law—there are no “legal black holes.”<sup>39</sup>

The Administration refuses to recognize that when al Qaeda members actually are combatants because they take direct part in hostilities, such as in Afghanistan or Iraq, they must be covered by IHL. When al Qaeda members carry out criminal acts in non-conflict situations, such as in Yemen, the United States, or Germany, peacetime criminal law applies. Criminal suspects may not be detained indefinitely without a trial; they may not be killed without warning, and they may not be interrogated using cruel, inhuman, or degrading methods.

The creation of the myth that some persons have no IHL protections apparently laid the foundation for the torture, coercion, and abuse of persons in United States detention.<sup>40</sup> The prevailing view at detention centers appears to be that because the Administration says that terrorists are not protected by the Geneva Conventions or by other IHL, they are not. The President has extended what he considers a discretionary promise to treat detainees humanely, but even that gesture is hedged by limiting it to the extent required by military necessity.

## B. *Universal IHL Protection*

Turning away from the Administration's version of the law to what the law actually requires, we find under IHL that persons who are members of

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<sup>36</sup> Memorandum from William J. Haynes II, General Counsel of the Department of Defense, to Members of the ASIL-CFR Roundtable, Enemy Combatants (Dec. 12, 2002), available at <http://www.cfr.org/publication.html?id=5312> [hereinafter Haynes Memo]

<sup>37</sup> See Gonzales Decision, *supra* note 1, at 118; see also Haynes Memo.

<sup>38</sup> See *infra* notes 64–70 and accompanying text.

<sup>39</sup> This is an expression used by several human rights organizations to describe what the Bush Administration has tried to do with respect to denying any human rights to certain persons in its custody. See, e.g., Amnesty International, *Torture: No Place in the World in the Twenty-First Century* (Nov. 23, 2004), available at 2004 WLNR 17043063.

<sup>40</sup> This is certainly the view of many human rights organizations and Democratic law-makers. See, e.g., Curt Anderson, *Memos Outlined How U.S. Saw Geneva Rules*, SEATTLE TIMES, June 10, 2004, at A10.

the regular armed forces of a state involved in an armed conflict, and persons who take direct part in the armed conflict, are combatants.<sup>41</sup> If a combatant has a right to take part in hostilities—such as the regular members of the armed forces, militia members meeting certain criteria, or civilians involved in a *levée en masse*<sup>42</sup>—he is a lawful combatant. A person who has no right to take part is an unlawful combatant.<sup>43</sup> Persons taking no direct part are civilians. Different rules apply as to the wartime right to target and detain persons in each category—lawful combatant, unlawful combatant, and civilian. No person, regardless of category, may be tortured, coerced, or abused during interrogation.

In an armed conflict between two or more parties to the Geneva Conventions, lawful combatants detained by an adverse power must be treated as prisoners of war under the Third Geneva Convention Relative to the Treatment of Prisoners of War (Prisoner's Convention). Under Article 17 of the Prisoner's Convention:

No physical or mental torture, *nor any other form of coercion*, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.<sup>44</sup>

Civilians are protected under the Fourth Geneva Convention (Civilian's Convention). If they are detained by an adverse power or an occupying power, then Article 31 applies: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."<sup>45</sup>

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<sup>41</sup> See O'CONNELL, *supra* note 26, at 415–18.

<sup>42</sup> The *levée en masse* occurs when the civilian population spontaneously takes up arms to resist an invading army when there is no time to organize.

<sup>43</sup> For more on this category, see Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COLUM. J. TRANSNAT'L L. 435 (2005); Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 37–55 (2004); Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L REV. OF THE RED CROSS 45 (2003); George Aldrich, *The Taleban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002).

<sup>44</sup> Prisoner's Convention, *supra* note 22, art. 17 (emphasis added).

<sup>45</sup> Civilian's Convention, *supra* note 22, art. 31. Article 4 of the Civilian's Convention excludes nationals of the detaining power and the detaining power's co-belligerents or certain neutral states even if a party to the Convention. *Id.* art. 4. Such persons are nevertheless protected under the fundamental guarantees owed to anyone

Unlawful combatants should be treated as prisoners of war who have committed a criminal offense.<sup>46</sup> At a minimum, however, such persons, indeed *all* persons, detained in an international armed conflict are entitled to the protections of Additional Protocol I, Article 75. Article 75 is part of customary international law, and therefore binding on all states.<sup>47</sup> The United States shares this position. The United States is not a party to Additional Protocol I, but has accepted many of its provisions as customary international law including, in particular, Article 75:<sup>48</sup>

1. [P]ersons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [1949] Conventions or under this Protocol shall be treated humanely in all circumstances... Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

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caught in armed conflict. *Infra* notes 46–50 and accompanying text. U.S. nationals also have constitutional law protections. *Infra* notes 86–100 and accompanying text.

<sup>46</sup> Additional Protocol I has two provisions particularly relevant to the detention of persons who fight in hostilities but who do not meet the criteria of lawful combatant:

Article 44 (4) A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

Article 45 (3) Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Additional Protocol I, *supra* note 23, arts. 44, 45.

<sup>47</sup> A state that persistently objects at the time a rule of customary law is in formation may not be bound. The persistent objector rule, however, does not apply to the most important principles of international law, the *jus cogens* or peremptory norms. It is widely held that the prohibition on torture and other elements of Article 75 are *jus cogens*. Moreover, the United States is not a persistent objector to Article 75. The attempt by some in the Bush Administration to protest the rule in 2004–2005 simply comes too late. All of Article 75, *jus cogens* or not, binds the United States.

<sup>48</sup> Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419–31 (1987); see also Paust, *supra* note 5, at 818 n.27.

(a) Violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) Murder;
- (ii) Torture of all kinds, whether physical or mental;
- (iii) Corporal punishment and;
- (iv) Mutilation;

(b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

...

(e) Threats to commit any of the foregoing acts.<sup>49</sup>

While the word "coercion" does not appear in Article 75, techniques such as denying detainees religious material, forcefully shaving them, stripping them, and menacing them with dogs are plainly disallowed.<sup>50</sup>

In civil war, torture and cruel treatment are also prohibited. Following the transfer of political authority from the United States to Iraqis, the situation in Iraq is best characterized as civil war. Article 3, common to all four Geneva Conventions, includes the following basic protections for all persons detained in a civil war:

In the case of armed conflict not of an international character . . . each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(I) Persons taking no active part in the hostilities, . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or, faith, sex, birth, or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and

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<sup>49</sup> Additional Protocol I, *supra* note 23, art. 75.

<sup>50</sup> One author, in an analysis of the Geneva Conventions, describes coercion as follows: "The essence of coercion is the compulsion of a person by a superior force, often a government, to do or refrain from doing something involuntarily. The intentional application of an unlawful force that robs a person of free will is coercive." Jennifer K. Elsea, *Lawfulness of Interrogation Techniques Under the Geneva Conventions*, Cong. Research Serv., CRS Report for Congress Order Code RL32567 (Sept. 8, 2004), at 13, available at <http://www.fas.org/irp/crs/RL32567.pdf>. Bowden calls coercion "torture lite." Bowden, *supra* note 8, at 53.

degrading treatment.<sup>51</sup>

Defense Secretary Donald Rumsfeld authorized the use of techniques at Guantanamo Bay, Cuba, including stress positions, forced grooming, nudity, dogs, and physical coercion.<sup>52</sup> General Sanchez authorized the use of muzzled dogs to threaten detainees, stress positions, isolation, and sleep deprivation in Iraq.<sup>53</sup> One need not elaborate for present purposes on the patently unlawful and abhorrent technique of “waterboarding,” practiced by the CIA at undisclosed locations,<sup>54</sup> or on the practices observed by the FBI at Guantanamo Bay, including chaining a person in the fetal position for twenty-four hours without relief, sexual abuse and humiliation, and burning the inside of the ear with cigarettes.<sup>55</sup>

Neither the Geneva Conventions nor the Additional Protocols allow derogation from IHL interrogation protections on the basis of necessity. While the Conventions do recognize military necessity as a defense or standard against which to measure some actions, no necessity defense is provided respecting the provisions just discussed.<sup>56</sup>

Despite these clear mandates of IHL, the media have reported that the United States military is developing a new policy on detainee operations that creates a category called “enemy combatant,” whose protections may be “subject to military necessity.”<sup>57</sup> Plainly, IHL provides no military necessity

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<sup>51</sup> Prisoner’s Convention, *supra* note 22, art. 3.

<sup>52</sup> See William J. Hanyes II, Counter Resistance Techniques, Dec. 2, 2002, in *THE TORTURE PAPERS*, *supra* note 1, at 236; see also, Donald Rumsfeld, Counter Resistance Techniques, Jan. 15, 2003, in *THE TORTURE PAPERS*, *supra* note 1, at 239; Tim Golden & Don Van Natta, Jr., *U.S. Said to Overstate Value of Guatánamo Detainees*, N.Y. TIMES, June 21, 2004, at A1.

<sup>53</sup> Memorandum from Lt. Gen. Ricardo Sanchez to Commander U.S. Central Command Re: CJTF-7 Interrogation and Counter-Resistance Policy (Sept. 14, 2003), available at <http://www.aclu.org/Files/OpenFile.cfm?id=17850>.

<sup>54</sup> For a discussion of evidence of CIA unlawful interrogation methods, including waterboarding, see *supra* note 14.

<sup>55</sup> For a discussion of FBI communications on unlawful interrogations techniques at Guantanamo Bay, see *supra* note 14.

<sup>56</sup> It should be emphasized that becoming a party to a treaty is a voluntary act by a state. In the case of the United States, it required consent of two-thirds of the Senate and ratification by the President to become a party to the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention Against Torture. See U.S. CONST., art. II, § 2, cl. 2.

<sup>57</sup> Associated Press, *Pentagon Will Spell Out Care, Handling of Detainees*, ST. LOUIS POST-DISPATCH, Apr. 9, 2005, at A30. Also, when Republican Senators McCain, Warner, and Graham tried to introduce legislation in the summer of 2005 requiring compliance with existing law on treatment of detainees, Vice President Cheney said that

exception to the interrogation protections enjoyed by any detainee.

In addition to the protections of IHL from torture, coercion, and abuse, the Geneva Conventions require that each party take certain implementation and enforcement measures. Parties to the Conventions must train their personnel in the rules and investigate and prosecute violations. All parties to the Conventions have an obligation to prosecute grave breaches of the Conventions: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."<sup>58</sup>

The grave breaches of the Civilian's Convention are found in Article 146 and include torture and inhuman treatment. These are the violations of the Convention that all parties have a duty to aid in enforcing. The Official Commentary indicates that Article 146 uses the "legal meaning" of "torture," which is "the infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information."<sup>59</sup> Inhuman treatment refers to more than "physical injury or injury to health. Certain measures, for example, which might cut the civilian internees off completely from the outside world and in particular from their families, or which caused grave injury to their human dignity, could conceivably be considered as inhuman treatment."<sup>60</sup>

The "grave breaches" provision of the Prisoner's Convention, Article 130, also includes "torture or inhuman treatment" as grave breaches of the Convention. The Official Commentary defines "torture" as the "infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information."<sup>61</sup> "Inhuman treatment" includes "certain measures, for example, which might cut prisoners of war off completely from the outside world and in particular from their families, or which would cause great injury to their human dignity . . . ."<sup>62</sup> Additional Protocol I reiterates and adds to the list of grave breaches and of the obligations on parties to take enforcement measures.

The following law relative to interrogation was applied in 2003 by the Ethiopia-Eritrea Claims Commission:

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the legislation would interfere with the President's authority. Eric Schmitt, *Cheney Working to Block Legislation on Detainees*, N.Y. TIMES, July 24, 2005, at A23.

<sup>58</sup> Civilian's Convention, *supra* note 22, art. 146; Prisoner's Convention, *supra* note 22, art. 129.

<sup>59</sup> IV COMMENTARY TO THE 1949 GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 598 (Jean Picet ed., 1958).

<sup>60</sup> Prisoner's Convention, *supra* note 22, art. 130.

<sup>61</sup> III COMMENTARY TO THE 1949 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 627 (Jean Pictet ed., 1960).

<sup>62</sup> *Id.* at 17.



75. Ethiopia alleges frequent abuse in Eritrea's interrogation of POWs commencing at capture and evacuation. International law does not prohibit the interrogation of POWs, but it does restrict the information they are obliged to reveal and prohibits torture or other measures of coercion, including threats and "unpleasant or disadvantageous treatment of any kind."

76. Ethiopia presented clear and convincing evidence, unrebutted by Eritrea, that Eritrean interrogators frequently threatened or beat POWs during interrogation, particularly when they were dissatisfied with the prisoner's answers. The Commission must conclude that Eritrea either failed to train its interrogators in the relevant legal restraints or to make it clear that they are imperative. Consequently, Eritrea is liable for permitting such coercive interrogation.<sup>63</sup>

## II. THE PEACETIME BAN

Persons detained outside an armed conflict or zone of occupation are not subject to the law of armed conflict, but rather to the law of peace. National criminal law in the first instance determines who may be detained and how individuals must be treated. National treatment is subject to international human rights law as the United States itself has made clear in its criticism of countries from Afghanistan to Zimbabwe.

Prohibition of torture, cruel, inhuman, and degrading treatment has been at the core of modern human rights law since the human rights movement began in the aftermath of World War II. Article 5 of the Universal Declaration of Human Rights states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>64</sup> This principle has been reconfirmed, restated, and elaborated in a series of important treaties, including the International Covenant on Political and Civil Rights (Article 7) (ICCPR),<sup>65</sup> the American Convention on Human Rights (Article 5),<sup>66</sup> the European Convention for the Protection of Human Rights

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<sup>63</sup> Fed. Democratic Republic of Ethiopia v. State of Eritrea (Perm. Ct. Arb. 2003), available at <http://www.pca-cpa.org/PDF/ET04%20-%20Part%203.pdf>.

<sup>64</sup> Universal Declaration of Human Rights, art. 5, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., U.N. Doc. A/RES/3/217 (1948).

<sup>65</sup> International Covenant on Civil and Political Rights, art. 7, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc A/6316 (Mar. 23, 1976) [hereinafter ICCPR].

<sup>66</sup> American Convention on Human Rights, art. 5, Nov. 22, 1969, 1144 U.N.T.S. 123.

and Fundamental Freedoms (Article 3),<sup>67</sup> the Convention Against Torture (Article 1, Article 16),<sup>68</sup> and the African (Banjul) Charter on Human and Peoples' Rights (Article 5).<sup>69</sup> The customary international law of human rights also prohibits torture as well as cruel, inhuman, and degrading treatment.<sup>70</sup>

The European Convention's prohibition in Article 3 has been the subject of a series of cases at the European Court of Human Rights (ECHR), and thus forms the basis of sophisticated jurisprudence on torture, inhuman, and degrading treatment. In addition, the European Court has in recent years taken the Convention Against Torture (CAT) into account in its decisions,<sup>71</sup> and, thus, the ECHR's jurisprudence on torture, cruel, inhuman, and degrading treatment is informative for all parties to the CAT, including the United States. The European Convention's Article 3 mandates that "no one shall be subjected to torture or inhuman or degrading treatment or punishment."<sup>72</sup>

Denmark, Norway, Sweden, and the Netherlands brought the first Article 3 complaint against Greece in 1967 for the severe beating of individuals to obtain information about suspected subversive activities.<sup>73</sup> The European Commission on Human Rights found that beating persons to obtain information was torture. In 1976, the European Court of Human Rights decided a landmark case between Ireland and Britain over British detention and interrogation practices in Northern Ireland during the early 1970s that

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<sup>67</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Apr. 11, 1950, 213 U.N.T.S. 222 [hereinafter ECPHR].

<sup>68</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1, 16, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (June 26, 1987) [hereinafter Convention Against Torture].

<sup>69</sup> African (Banjul) Charter on Human and Peoples' Rights, art. 5, June 27, 1981, 21 I.L.M. 58 (1982).

<sup>70</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) ("Customary International Law of Human Rights: A state violates international law if, as a matter of state policy, it practices, encourages or condones . . . (d) torture or other cruel, inhuman or degrading treatment or punishment.")

<sup>71</sup> In *Ilhan v. Turkey* and *Salman v. Turkey*, the Court expressly referenced the Convention Against Torture. *Ilhan v. Turkey*, 34 Eur. H.R. Rep. 36, 869, 905 (2002); *Salman v. Turkey*, 34 Eur. H.R. Rep. 17, 425, 447 (2002). While the ECHR's decisions are not binding on the United States per se, its interpretation and application of a treaty that is binding on the United States is authoritative for the United States.

<sup>72</sup> ECPHR, *supra* note 67, art. 3.

<sup>73</sup> The Greek Case, 12 Y.B. EUR. CONV. ON H.R. 1, 186 (1969).

included hooding, sleep deprivation, and restricted diets.<sup>74</sup> The court distinguished between torture and inhuman or degrading treatment, finding that the practices violated Article 3, but did not amount to torture. The techniques were nevertheless declared unlawful, and the United Kingdom discontinued them.<sup>75</sup> Conditions of detention also fall under Article 3. Prisons with no light, no open air, no communication, and no exercise space have been considered to be in violation of Article 3.<sup>76</sup> Additionally, sending persons to a country where they might be tortured or subject to inhuman treatment can itself be an inhuman action in violation of Article 3.<sup>77</sup>

In recent cases, the European Court has focused more on the purpose behind the unlawful treatment rather than on trying to measure the severity of pain. This approach is in line with the Convention Against Torture,<sup>78</sup> where the focus is also on the purpose for which the victim is being subjected to pain—to gain information or a confession. In *Keenan v. United Kingdom*, the court stated that “[w]hile it is true that the severity of suffering . . . has been a significant consideration in many of the cases decided by the court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor.”<sup>79</sup> In a 2004 case, *Aktas v. Turkey*, Mr. Aktas was presumptively beaten to death.<sup>80</sup> The Court had “no difficulty drawing the inference that the suffering inflicted . . . was particularly severe and cruel, . . . and that the purpose of the perpetrators was to obtain information or a confession of guilt.”<sup>81</sup>

The Human Rights Committee, charged with implementing the ICCPR, has found the following to be cruel and inhuman treatment:

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<sup>74</sup> *The Republic of Ireland v. The United Kingdom*, 2 Eur. H.R. Rep. 25, 25–26 (1978).

<sup>75</sup> Under more recent decisions of the ECHR, some believe that the methods used by the United Kingdom would amount to torture. See David Hope, *Torture*, 53 INT’L & COMP. L. Q. 807, 826 (2004).

<sup>76</sup> See Malcolm D. Evans, *Getting to Grips with Torture*, 51 INT’L. COMP. L. Q. 365, 372 (2002).

<sup>77</sup> *Id.*

<sup>78</sup> Convention Against Torture, *supra* note 68; see also Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, princ. 6, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Annex, Supp. No. 49, U.N. Doc. A/43/49 (Dec. 9, 1988).

<sup>79</sup> *Keenan v. United Kingdom*, Eur. H.R. Rep. Comm. Supp., CD64, para. 113 (1998).

<sup>80</sup> *Aktas v. Turkey*, 38 Eur. H.R. Rep. 18, ¶ 333, ¶¶ 392–93 (2004).

<sup>81</sup> *Id.* at ¶ 329.

beating to point of unconsciousness; denial of appropriate medical care; incommunicado detention for more than a year; repeated beatings with clubs, pipes, and batons without medical attention; detainment in a cell measuring twenty by five meters with 125 other prisoners and without any food or water; death threats; incarceration in a cell for twenty-three hours per day without bedding, food, sanitation, or natural light; being forced to stand for thirty-five hours, with wrists bound by coarse cloth and eyes continuously bandaged; and deprivation of food and drink for four days following arrest while being detained in unsanitary conditions.<sup>82</sup>

The Committee has found the following acts to be degrading:

dumping a bucket of urine on a prisoner's head, throwing his food and water on the floor, and his mattress out of his cell; beating prisoners with rifle butts and subsequently refusing them medical treatment; detaining individuals in cages and displaying them to the media; assaulting prisoners kept in tiny cells and limiting the number of visitors they may receive; chaining detainees to bed springs for three months; rubbing salt into prisoners' nasal passages and forcing them to spend the night chained to a chair; administering beatings requiring stitches; blindfolding and dunking detainees heads in a canal; denial of exercise, medical treatment, and asthma medication; and whippings and beatings with a birch or tamarind switch.<sup>83</sup>

The European Court has also found that states will be in breach of Article 3 not only when their own agents are perpetrating the ill-treatment, but also when a state fails to prevent serious forms of ill-treatment from occurring or fails to make adequate investigations into claims of abuse.<sup>84</sup> Furthermore, the court has expanded the definition of who can count as a victim under Article 3. In *Kurt v. Turkey*, a mother who witnessed the abduction of her son was considered a victim of an Article 3 violation.<sup>85</sup>

The United States understands the prohibition on torture, cruel, inhuman, and degrading treatment of the Convention Against Torture to be the same as the prohibition of "cruel and unusual punishment" in the United States

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<sup>82</sup> Jason R. Odeshoo, *Truth or Dare?: Terrorism and "Truth Serum" in the Post-9/11 World*, 57 STAN. L. REV. 209, 243 (2004) (citing *Linton v. Jamaica*, Comm. No. 255/1987, U.N. GAOR Hum. Rts. Comm., 46th Sess., U.N. Doc. CCPR/C/46/D255/1987 (Nov. 2, 1992)); *Polay Campos v. Peru*, Comm. No. 577/1994, U.N. GAOR Hum. Rts. Comm., 61st Sess., U.N. Doc. CCPR/C/61/D/577/1994 (Nov. 6, 1997)).

<sup>83</sup> Odeshoo, *supra* note 82, at 243-44.

<sup>84</sup> See *Kaya v. Turkey*, 2000-III Eur. Ct. H.R. 151, App. no. 22535/93, 154 (2000).

<sup>85</sup> See *Kurt v. Turkey*, 27 Eur. H.R. Rep. 373, 378 (1998).

Constitution.<sup>86</sup> This may or may not be so. To the extent it is not, it cannot alter America's legal obligations under the CAT, but American jurisprudence should be helpful in understanding what is cruel and inhuman treatment in interrogation. People are interrogated by law enforcement personnel in the United States for two reasons: because they are suspected of having committed a crime and the police are seeking a confession, or because they are suspected of having information about a crime. We will briefly review the protections around interrogations in both situations.

The United States Supreme Court ruled that the due process clauses of the Fourteenth Amendment and the Fifth Amendment privilege against self-incrimination require voluntary confessions of guilt.<sup>87</sup> More generally, Justice Frankfurter wrote that "[c]oerced confessions offend the community's sense of fair play and decency."<sup>88</sup> Before a jury can hear a confession, the judge must make a determination by a preponderance of the evidence that the confession was voluntarily given.<sup>89</sup> The court must consider the totality of the circumstances regarding whether the defendant's will was actually overborne.<sup>90</sup> Factors to consider include the suspect's age, education, and mental and physical condition, along with the setting, duration, and manner of police interrogation.<sup>91</sup>

<sup>86</sup> See U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 101st Cong., 136 CONG. REC. 36,192-93 (1990).

<sup>87</sup> *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961); see also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE*, 423-54 (3d ed., 2002); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2009 (1998). The Eighth Amendment is relevant, too, in its prohibition on cruel and unusual punishment. U.S. CONST. amend. VIII.

<sup>88</sup> *Rochin v. California*, 342 U.S. 165, 173 (1952).

<sup>89</sup> *Lego v. Twomey*, 404 U.S. 477, 486 (1972). Involuntary confessions are inadmissible not because

such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured . . .

*Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

<sup>90</sup> *Spano v. New York*, 360 U.S. 315, 323 (1959).

<sup>91</sup> *Id.* at 321 (citing *Haley v. Ohio*, 332 U.S. 596, 599 (1948)) (age); *Payne v. Arkansas*, 356 U.S. 560, 563 (1958) (education); *Fikes v. Alabama*, 352 U.S. 191, 196-97 (1957) (low intelligence); *Chambers v. Florida*, 309 U.S. 227, 230-31 (1940) (length of detention); *Ashcraft v. Tennessee*, 322 U.S. 143, 149 (1944) (the repeated and prolonged nature of the questioning)); see also *Davis v. North Carolina*, 384 U.S. 737, 740-41 (1966) (the lack of any advice to the accused of his constitutional rights). Other

Confessions have been found to be involuntary for diverse reasons. A confession was involuntary if the defendant was physically beaten or subjected to an inordinately long interrogation.<sup>92</sup> A D.C. district court considered a case in which a suspect was interrogated for passing an altered dollar bill. After receiving *Miranda* warnings, the suspect was interrogated by Secret Service agents who forced him to strip and stand naked for a period of time while the questioning continued. The court found that in light of the circumstances, the defendant's waiver of his *Miranda* rights and subsequent confession were involuntary.<sup>93</sup>

Police do trick and deceive defendants during interrogation.<sup>94</sup> However, some promises and threats will make confessions inadmissible. Unlawful threats are those of physical violence, refusal to provide medication, removal of a spouse or child, the arrest of friends or family, and harsher punishments if a confession is not made.<sup>95</sup> Promises that make a confession inadmissible include those involving an impossible, improper, or illusory result, such as promises of immunity and clemency.<sup>96</sup> Appeals to religious beliefs are only coercive if they are designed to overcome the suspect's resistance by appealing to his fear of divine judgment.<sup>97</sup>

In 1966, the United States Supreme Court recognized that custodial police interrogation is inherently coercive and held that a person in custody

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factors to consider may be the race of the suspect and the suspect's prior experience with police. 22 AM. JUR. 2D *Proof of Facts* § 2, at 550 (2004).

<sup>92</sup> *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936); *Leyra v. Denno*, 347 U.S. 556, 561 (1954).

<sup>93</sup> *U.S. v. Blocker*, 354 F.Supp. 1195, 1201 (D.C. Cir. 1973):

Since the strip search in this case occurred at the outset of the interrogation, the only reasonable conclusion is that the agents conducted the strip search to humiliate the defendant into confessing against his will. While in certain circumstances a strip search may be reasonable and indeed necessary, this court cannot countenance such a procedure when its sole purpose is to break down resistance by humiliating and personally degrading an individual in police custody.

*Id.*

<sup>94</sup> MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 473 (2003).

<sup>95</sup> While the courts generally have held that a confession is involuntary if it was in fact induced by such a threat or promise concerning the arrest, release, or custody of a relative or close friend, the courts have not always been in agreement as to what constitutes such a threat or promise, and in many cases the facts themselves are sharply disputed. 22 AM. JUR. 2D *Proof of Facts* § 5, at 556 (2004).

<sup>96</sup> *Id.* § 4. Confessions required by the explicit conditions of the plea bargain are inadmissible. *Hutto v. Ross*, 429 U.S. 28, 30 (1976).

<sup>97</sup> 22 AM. JUR. 2D *Proof of Facts* § 4, at 555 (2004).

must be read his "rights" before interrogation.<sup>98</sup> These "*Miranda* rights" include the right to remain silent, the warning that anything said can and will be used against the individual in court, the right to have counsel present before interrogation and at the interrogation, and the right to have counsel appointed if the person is indigent.<sup>99</sup> Today, a confession generally will be inadmissible in a prosecutor's case-in-chief if the police have either failed to inform a defendant of her rights or failed to get a waiver of those rights. No use may be made at trial of a coerced confession.<sup>100</sup> Other uses of a coerced confession could result in claims by the victim of coercion that her Fourteenth Amendment due process rights were violated.

Another context in which national law enforcement agents interrogate occurs in the questioning of witnesses. Sometimes witnesses are uncooperative. The common law has long embraced a device to secure the cooperation of such witnesses through material witness detention: "A material witness is an individual who has unique information about a crime, beneficial to defense or prosecution. The United States has a history of authorizing and sanctioning the custodial detention of such witnesses to ensure their appearance and testimony at relevant court proceedings."<sup>101</sup> The detention of the witness is clearly a form of pressure to get cooperation, but it is not considered unlawful coercion.<sup>102</sup> Still, it is understood that detention

<sup>98</sup> *Miranda v. Arizona*, 384 U.S. 436, 467 (1966):

We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.

*Id.* If a suspect does not understand English, the suspect must receive the warnings in his own language. See *State v. Santiago*, 556 N.W.2d 687, 690 (Wis. 1996).

<sup>99</sup> *Miranda*, 384 U.S. at 469–73.

<sup>100</sup> *Berkemer v. McCarty*, 468 U.S. 420, 433, n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."); 22 AM. JUR. 2D *Proof of Facts* § 1, at 546–47 (2004).

<sup>101</sup> Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483, 485 (2002).

<sup>102</sup> Waldron argues that

penalties for contempt and perjury are coercive: they impose unwelcome costs on certain options otherwise available to the witness. Even so, there is a difference of quality, not just a difference of degree, between the coercion posed by legally established penalties for non-compliance and the sort of force that involves using pain to twist the agency and break the will of the person being interrogated.

Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House* 23–24 (Nov. 4, 2004), <http://www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf> (citing

should happen only rarely.<sup>103</sup> Unlawful coercion of a material witness may result in exclusion of the witness's testimony. Examples include actual and threatened physical violence. Such coerced confessions are also excluded under the Federal Rules of Evidence.<sup>104</sup>

Thus, international law, which generally includes these domestic law protections, provides broad substantive rights to interrogees in peacetime from cruel, inhuman, and degrading treatment. Important to the enjoyment of these protections, international law does not recognize excuses or defenses by interrogators for suspending them. Israel's High Court of Justice in a 1999 case ruled that "neither the government nor the heads of the security services [have] the authority to establish directives . . . regarding the use of . . . physical means during the interrogation of suspects suspected of hostile terrorist activities . . . ." <sup>105</sup> Unfortunately, the court left a loophole

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Bradley Graham, *Abuse Probes' Impact Concerns the Military; Chilling Effect on Operations Is Cited*, WASH. POST, Aug. 29, 2004, at A20). Waldron also writes that "law can be forceful without compromising the dignity of those it constrains and punishes." *Id.* at 50.

<sup>103</sup> Studnicki & Apol, *supra* note 101, at 485. The right to detain material witnesses has been abused since September 11, 2001:

[The material witness law] was never conceived . . . as a means to detain those whom the authorities suspected of being a threat to society but did not have enough evidence to charge . . . . With the War on Terrorism, the legal seas have changed. The designation of material witness has often become a temporary moniker to identify an individual who will soon bear the status of defendant.

Laurie L. Levenson, *Detention, Material Witnesses & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217, 1222-23 (2002); *see also* Studnicki & Apol, *supra* note 101, at 485-86:

The detention of material witnesses should be a seldom-used procedure. Recent events, however, particularly the September 11, 2001 terrorist attacks on the United States, have brought material witness laws to the forefront as the government seeks to use the laws as investigatory tools to detain individuals while determining whether a crime has been committed by the detainee or perhaps by an acquaintance of the detainee. Such 'investigatory detentions' are not only a misuse of the material witness laws, but also troubling and potentially unconstitutional.

*Id.* (footnotes omitted).

<sup>104</sup> Studnicki & Apol, *supra* note 101, at 529.

<sup>105</sup> HCJ 5100/94 Pub. Comm. Against Torture in Israel v. The State of Israel, 38 I.L.M. 1471, 1488 (1999); *see also* Ardi Imseis, "Moderate" Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods, 19 BERKELEY J. INT'L L. 328 (2001); Melissa Clark, *Israel's High Court of Justice Ruling on the General Security Service Use of "Moderate Physical Pressure": An End to the Sanctioned Use of Torture?*, 11 IND. INT'L & COMP. L. REV. 145 (2000). For more on the situation in Israel before the High Court decision, *see* John Quigley, *International Limits on Use of Force to Elicit Confessions: A Critique of Israel's Policy on Interrogation*, 14 BROOK. J. INT'L L. 485 (1988).



through which the prohibition could be swallowed. It decided that even though necessity could not be used as authority to permit physical coercion in interrogation, necessity could be invoked as a defense by an interrogator who is accused of using coercion.<sup>106</sup> The U.N. Human Rights Committee commented with respect to this aspect of the Israeli case that necessity cannot be a defense to the use of torture.<sup>107</sup>

The Convention Against Torture also disallows necessity and other excuses as defenses to torture. Article 2(2) provides: "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."<sup>108</sup> It does not specifically disallow necessity for lesser violations of the Convention, that is, for cruel, inhuman, and degrading treatment. The International Civil and Political Rights Covenant, however, in providing for derogations during emergencies, prohibits derogation from Article 7 as a whole. In addition, the Committee of Ministers of the Council of Europe affirmed in July 2002 that "[t]he use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of . . . terrorist activities, irrespective of the nature of the acts that the person is suspected of . . ."<sup>109</sup> Thus, torture, cruel, inhuman, and degrading treatment are all considered non-derogable prohibitions even in times of national emergency.<sup>110</sup>

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<sup>106</sup> *Pub. Comm. Against Torture in Israel*, 38 I.L.M. at 1488.

<sup>107</sup> "The committee is concerned that interrogation techniques incompatible with article 7 of the Covenant are still reported frequently to be resorted to and the 'necessity defence' [sic] argument, which is not recognized under the Covenant, is often invoked and retained as a justification for ISA actions in the course of investigations." Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Israel*, para. 18, U.N. GAOR 78th Sess., U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003).

See also Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, 2 J. INT'L CRIM. JUST. 785 (2004). The author concludes that necessity is not a defense, in part because torture is never "necessary," it being an unreliable and time-consuming form of information-gathering.

<sup>108</sup> Convention Against Torture, *supra* note 68, art. 2.

<sup>109</sup> Waldron, *supra* note 102, at 7 n.17 (quoting Sanford Levinson, "Precommitment" and "Postcommitment": *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2016 (2003)).

<sup>110</sup> ICCPR, *supra* note 65, art. 4. See also ECPHR, *supra* note 67, art. 15; The Republic of Ireland v. The United Kingdom, 2 Eur. H.R. Rep. 25 (1978) (prohibition on inhuman and degrading treatment applied during a time of emergency caused by IRA terrorism).

### III. IGNORE THE BANS?

This is the law governing interrogation, and it is likely to remain the law. Even the Bush Administration has made no move to request any formal change in IHL, the Convention Against Torture, or the International Convention on Civil and Political Rights.<sup>111</sup> None of the other parties to these treaties shows any willingness to effectuate change. Nevertheless, a few in the United States have called for our country to ignore the law. They argue that it is effective to torture and coerce during interrogation and that effectiveness justifies law violation in a war on terror. The next section examines these claims. At the end of the section, we consider briefly the erroneous notion that international law cannot be enforced and therefore need not be taken seriously. This misconception has also been part of the discussion around coercive interrogation and will be clarified here.

#### A. *Unjustified Law Violations*

It should be completely irrelevant to Americans that coercive interrogation can result in useful information. The practice is unlawful and we are a nation under law that does not engage in unlawful practices as a matter of official policy. Even if the practice was not unlawful, it is immoral, and for that reason we must reject it regardless of any arguments of effectiveness.<sup>112</sup> To torture, coerce, or abuse someone in custody is an affront to human dignity; it offends any moral code. As Israel's High Court said in its decision prohibiting the use of physical coercion during interrogation of suspected terrorists:

This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its

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<sup>111</sup> It has, however, refused to become a party to the CAT protocol allowing surprise prison inspections as a measure to deter torture and cruel, inhuman, and degrading treatment. Indeed, the United States tried to prevent the protocol from being adopted. See Barbara Crossette, *U.S. Fails in Effort to Block Vote on U.N. Convention on Torture*, N.Y. TIMES, July 25, 2002, at A7.

<sup>112</sup> Waldron, *supra* note 102, at 81.

understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.<sup>113</sup>

There is only one phrase of this eloquent statement about which more needs to be said. The High Court assumes that relinquishing coercive interrogation techniques means giving up some advantage in the struggle against terrorism. This is a false assumption. The evidence indicates that societies that respect legal rights and human dignity, even of the most heinous criminals, have greater success in repressing crime than those that do not.<sup>114</sup> Refusing to coerce detainees is not fighting with "one hand tied behind its back." On the contrary, the weight of the evidence shows that trained and skillful interrogators do not need to use coercion.<sup>115</sup> The use of coercion and the violation of other important human rights have been counter-productive in struggles against terrorism.

Two popular writers, Mark Bowden and Alan Dershowitz, have called for the use of coercion and even torture by the United States in the interrogation of terrorist suspects. They both believe forceful interrogation is an effective means of information-gathering.<sup>116</sup> Both authors, however, rely on anecdotes to support their arguments. Most of the anecdotes that actually condone coercion come from Israeli interrogators, men who have used torture and coercion, and, therefore, have a vested interest in presenting the use of such measures as successful. Their claims must be discounted.

Bowden also provides anecdotes from the United States and Germany. Far from supporting coercion, these anecdotes lead us to conclude that *non-coercive* interrogation is amply effective. Bowden's American story concerns a New York City Police Detective named Jerry Giorgio. Giorgio, according to Bowden, is a masterful interrogator. But, in describing Giorgio's success, Bowden never mentions that he uses coercion. On the contrary, Giorgio does not even play "good cop/bad cop" in interrogation, because he never needs a "bad cop." The secret to getting information is getting a good interrogator and a good interrogator is someone people will talk to:

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<sup>113</sup> HCJ 5100/94 Pub. Comm. Against Torture in Israel v. The State of Israel, 38 I.L.M. 1471, 1488 (1999).

<sup>114</sup> See *infra* notes 126–35 and accompanying text. The wartime situation has an analog to this observation on peacetime protections. Since the time of Augustine in the Fifth Century, commentators on IHL have observed that those armies respecting the rights of their enemy have a greater chance to secure the peace following victory on the battlefield. See O'CONNELL, *supra* note 26, at 153.

<sup>115</sup> See *infra* notes 126–35 and accompanying text.

<sup>116</sup> See Bowden, *supra* note 8, at 76; ALAN DERSHOWITZ, WHY TERRORISM WORKS, UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 138 (2002).

You want a good interrogator? . . . Give me somebody who people like, and who likes people. Give me somebody who knows how to talk to put people at ease. Because the more comfortable they are, the more they talk, and the more they talk, the more trouble they're in—the harder it is to sustain a lie.<sup>117</sup>

Who likes to talk to someone who is sticking needles under his fingernails?<sup>118</sup> Indeed, as will be discussed below, the use of force during interrogation is counter-productive to the intelligence-gathering effort, since once abused, a person will not cooperate.<sup>119</sup>

Bowden's example from Germany equally fails to support coercion. A deputy police chief threatened a suspect with torture to get the suspect to take him to where a kidnapped boy was hidden. The suspect went to the place, but the boy was dead. This tragic outcome must disqualify this example as one of successful coercive interrogation. The policeman was prosecuted for his unlawful action, found guilty, and lost his job.<sup>120</sup>

Dershowitz also relies heavily on the case of Abdul Hakim Murad for his conclusion that torture works. Dershowitz says Murad was tortured in the Philippines for sixty-seven days at which point he "may" have revealed information about various al Qaeda plots.<sup>121</sup> Writers referring to the case, however, have raised doubts as to whether Murad was actually tortured and whether anything he told the Philippine authorities was actually true.<sup>122</sup> Further, professional interrogators dismiss out of hand the claim that after

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<sup>117</sup> Bowden, *supra* note 8, at 58. Bowden also spends several pages of his article reviewing experiments from the 1960s aimed at finding effective means of coercive and torturous interrogation. He notes that in all cases the experiments proved inconclusive. "One thing all these experiments made clear was that no matter what drugs or methods were applied, the results varied from person to person." *Id.* at 58. Several of his anecdotes bear this out. Yet he concludes that "[i]t is wise of the President to reiterate U.S. support for international agreements banning torture, and it is wise for American interrogators to employ whatever coercive methods work." *Id.* at 76.

<sup>118</sup> This is one of the techniques recommended by Alan Dershowitz. DERSHOWITZ, *supra* note 116, at 148.

<sup>119</sup> See *infra* notes 126–38 and accompanying text.

<sup>120</sup> Bowden, *supra* note 8, at 70.

<sup>121</sup> DERSHOWITZ, *supra* note 116, at 137.

<sup>122</sup> See Jonathan F. Lenzer, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession's Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO J. INT'L & COMP. L. 297, 314 (2004); Andrew A. Moher, *The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post 9/11 World*, 26 T. JEFFERSON L. REV. 469, 480–81 (2004) ("[T]he veracity of Murad's confessions has recently come into dispute . . .").

sixty-seven days anything Murad might have told authorities could have been of any real value in preventing plots.

A case involving a U.S. Army Colonel in Iraq, which occurred after Bowden and Dershowitz wrote, has received considerable attention to the point that it has become an urban legend. The actual facts provide no support for the effectiveness of coercive interrogation: in April 2003, north of Baghdad, Colonel Allen B. West, on a tip from an informant, ordered his men to beat a detainee for information.<sup>123</sup> When the detainee would say nothing, West fired his revolver at him twice, near the man's head, the second time after counting down. Following the second mock execution, the man began to provide all kinds of details—names, dates, etc. “[H]e was not sure what he told the Americans, but that it was meaningless information induced by fear and pain.”<sup>124</sup> No evidence of a plot was ever found; no one was arrested. The detainee was released after forty-five days without charge. Colonel West was fined and dismissed from the service. He was not court-martialed.<sup>125</sup>

This story illustrates the usual result of coercive interrogation—saying anything to get the pain and fear to stop. Based on this fact, long-held United States Army and FBI policies have rejected coercive interrogation as unlawful, immoral, and unreliable. The 1987 United States Army Interrogation Field Manual 34-52 includes the following statement:

The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US [sic] Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear. However, the use of force is not to be confused with psychological ploys, verbal trickery, or other nonviolent and noncoercive ruses used by the interrogator in questioning hesitant or uncooperative sources.<sup>126</sup>

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<sup>123</sup> Deborah Sontag, *How U.S. Officer's Risk in Iraq Backfired*, INT'L HERALD TRIB., May 28, 2004, at 2.

<sup>124</sup> *Id.*

<sup>125</sup> He was cheered at a luncheon talk a few short weeks after the national broadcast of the abuse pictures from Abu Ghraib prison in Iraq. Lona O'Connor, *Army Officer Who Threatened Prisoner Addresses Luncheon*, PALM BEACH POST, May 28, 2004, at 5C.

<sup>126</sup> U.S. Army, Intelligence Interrogation Field Manual 34-52, 1-1 (May 8, 1987). The United States Army is preparing a new interrogation field manual that reportedly will expressly prohibit harsh techniques. See Eric Schmitt, *Army, in Manual Limiting Tactics*

Similarly, FBI agents prefer “the bureau’s long-accepted, court-approved interrogation policy of building rapport with detainees to obtain information about terrorism.”<sup>127</sup> In a serious academic study of the effectiveness of coercion in interrogation, Darius Rejali concluded that “there is no empirical evidence to suggest that [torture] works, at least in the way that people claim that it does in the war against terrorism . . . .”<sup>128</sup>

Rejali’s conclusion is confirmed by Douglas Johnson, Executive Director for the Center of Victims of Torture. The Center has provided care to over 7500 victims of torture from sixty countries. In testimony before Congress, Johnson said:

The assumption behind the [torture] memoranda . . . is that some form of physical and mental coercion is necessary to get information to protect the American people from terrorism. These are unproven assumptions based on anecdotes from agencies with little transparency, but they have been popularized in the American media by endless repetition of what is called the ticking time bomb scenario. Based on our experience at the center with torture survivors and understanding the systems in which they have been abused, we believe it is important that these discussions [about interrogation] not be shaped by speculation but rather through an understanding of how torture is actually used in the world. From our understanding, we have derived eight broad lessons. And those are:

First of all, torture does not yield reliable information.

Secondly, torture does not yield information quickly.

Third, torture has a corrupting effect on the perpetrator.

Fourth, torture will not be used only against the guilty.

In fact, fifth, torture has never been confined to narrow conditions; once it’s used, it broadens;

Psychological torture results in long-term damage.

Stress and duress techniques are forms of torture.

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*in Interrogation, Seeking to Avoid Abuses, Harsh Techniques Used at Abu Ghraib Will Be Expressly Banned*, N.Y. TIMES, Apr. 28, 2005, at A1.

<sup>127</sup> Toni Locy & Kevin Johnson, *FBI Had Warned Pentagon on Tactics*, USA TODAY, Dec. 8, 2004, at 1A; Email (parties redacted) Re: GTMO-Related Emails, Notes Etc. (May 10, 2004), [http://www.aclu.org/torturefoia/released/FBI\\_4142.pdf](http://www.aclu.org/torturefoia/released/FBI_4142.pdf) (indicating concern about Department of Defense interrogation practices and the FBI position recommending “rapport based” interrogation).

<sup>128</sup> Michael Slackman, *The World: A Dangerous Calculus; What’s Wrong with Torturing a Qaeda Higher-Up?*, N.Y. TIMES, May 16, 2004, at D4; see also DARIUS REJALI, *TORTURE & MODERNITY: SELF, SOCIETY AND STATE IN MODERN IRAN* (1994).

And finally, number eight, we cannot torture and still retain the moral high ground.<sup>129</sup>

Highly trained and experienced United States Army interrogators confirm Johnson's conclusions. Indeed, they go further to say that the use of coercion and abuse is counter-productive to intelligence-gathering. Its use by the United States since 9/11 has likely cost this country lives:

Such behavior not only causes needless suffering for the victim and is criminal, it jeopardizes the intelligence collection effort. Once a prisoner has been abused, gaining his or her willing cooperation is often impossible, even for a highly-skilled interrogator. In addition, any information gained during such an interrogation cannot be regarded as dependable or reliable.<sup>130</sup>

The Administration has claimed that it has gotten useful information using coercive and abusive tactics at Guantanamo. However, one of the FBI e-mails from Guantanamo Bay, released in December 2004 states: "These

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<sup>129</sup> Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States before the S. Comm. on the Judiciary, 109th Cong. 1 (2005) (testimony of Douglas Johnson). For similar conclusions, see also Merle L. Pribbenow, *The Man in the Snow White Cell*, 48 STUDIES IN INTELLIGENCE 59 (2004).

<sup>130</sup> Declaration of Peter Bauer Filed in Support of Plaintiffs' Motion for Preliminary Injunction Against CACI International, para. 9, Saleh v. Titan, Case No. 04 CV 1143 R (NLS) (S.D. Cal. 2004); see also Declaration of Marney Mason Filed in Support of Plaintiffs' Motion for Preliminary Injunction Against CACI International, Saleh v. Titan, Case No. 04 CV 1143 R (NLS) (S.D. Cal. 2004) (the two declarants have eleven and eighteen years of experience as Army interrogators respectively). For the similar views of experienced FBI agents, see Jason Vest, *Pray and Tell*, AM. PROSPECT, July 2004, at 47. Apparently military lawyers also objected to the Administration's departure from long-time policy and codified law. Vanessa Blum, *Early Warning: Military Lawyers Fought Justice Department, Argued Interrogation Techniques Would Backfire*, BROWARD DAILY BUS. REV., Aug. 3, 2005, at 10; Neil A. Lewis, *Military's Opposition to Harsh Interrogation is Outlined*, N.Y. TIMES, July 28, 2005, at A21.

The Israeli High Court based its allowance of the necessity defense for some cases of coercion on the basis of the infamous "ticking time bomb" hypothetical. HCJ 5100/94 Pub. Comm. Against Torture in Israel v. The State of Israel, 38 I.L.M. 1471, 1485-86 (1999). Plainly, if torture and coercion are unreliable, the last time you would want to use them are in situations where time is of the essence. Therefore no more need be said here on the ticking time bomb. But, for a discussion of the unrealistic nature of both the ticking time bomb scenario and the ability to restrict torture to very limited situations, see Waldron, *supra* note 102, at 38-39 (citing Henry Shue, *Torture*, in 7 PHILOSOPHY AND PUBLIC AFFAIRS 124, 141-42 (1978)).

tactics have produced no intelligence of a threat neutralization nature to date.”<sup>131</sup>

Finally, societies known to use torture, coercion, and abuse have not resolved their problems of terrorism. Societies that have abandoned such practices or never used them in the first place have had greater success. Northern Ireland is a telling example. In the early years of the “troubles” in Northern Ireland, the British government adopted emergency powers that led to the coercive and abusive treatment of terrorism suspects:

The mistreatment of suspects while in custody under emergency powers included use of methods that have been condemned by courts worldwide. These include intensive interrogations for extended periods, sleep deprivation, hooding of suspects, the use of white noise, forcing suspects to stand or kneel in uncomfortable positions for extended periods of time, threats and beatings of suspects, and standing on the backs of suspects’ legs, among others. Even government commissions, while attempting to minimize the allegations, have acknowledged that the government adopted abusive interrogations practices as a policy.<sup>132</sup>

While the emergency powers were in place and these abuses were being committed, “[t]he Commander of the IRA in the Maze Prison, Jim McVeigh, called the emergency provisions ‘the best recruiting tools the IRA ever had.’”<sup>133</sup> Academics studying the case reach the same conclusion:

Kiernan McEvoy, of Queens University-Belfast, who has studied the use of emergency legislation in Northern Ireland, has identified spikes in

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<sup>131</sup> Spencer Ackerman, *Island Mentality: Why the Bush Administration Defends Guantanamo*, THE NEW REPUBLIC, Aug. 22, 2005, at 17. Cf. Press Release, Dep’t of Defense, Guantanamo Provides Valuable Intelligence Information, No. 592-05 (June 12, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050612-3661.html>. Moreover, coercive tactics have resulted in deaths—hardly an outcome likely to aid information-gathering. Suspects have died, for example, in the course of coercive Israeli interrogations. See Amos N. Guiora, *The Unholy Trinity: Intelligence, Interrogation and Torture* 11 (Case Research Paper Series in Legal Studies, Working Paper 05-13, July 2005), available at <http://ssrn.com/abstract=758444>. A number of people are known to have died as a result of coercive tactics by U.S. interrogators in Afghanistan. See, e.g., Tim Golden, *Low Ranks Feel Swift U.S. Justice; Afghan Abuse Raises Questions of Officers*, INT’L HERALD TRIB., Aug. 9, 2005, at 7; Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee Who Died*, WASH. POST, Apr. 13, 2005, A07.

<sup>132</sup> Michael P. O’Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1683–84 (2003); see also *The Republic of Ireland v. The United Kingdom*, 2 Eur. H.R. Rep. 25 (1978).

<sup>133</sup> O’Connor & Rumann, *supra* note 132, at 1702.



violence surrounding the use of emergency powers to target the Catholic Republican community. Initially, some of the measures used had the effect of suppressing violence. But the manner in which the powers were used—disproportionately against the Republican community and with unchecked aggression by security forces—led to explosions in violence.<sup>134</sup>

Britain ended the use of coercive interrogation techniques<sup>135</sup> after the decision in the case before the European Court of Human Rights, discussed above. Subsequently, Britain reached a peace accord with Republican parties and the use of violence and support of the IRA has waned substantially. Germany and Italy provide even stronger examples of states that eliminated serious terrorism challenges, from the Red Army Faction and the Red Brigades in their respective countries, while remaining committed to requirements of international human rights principles.

Israel is a counter-example. Still understood to permit coercive interrogation methods through the necessity-defense loophole<sup>136</sup> and after decades when use of coercion was directly lawful and very widely used, it remains the target of unending terrorist attacks. According to Bowden, two-thirds of all Palestinian suspects in Israeli custody have been subjected to torture or coercion in Israeli detention.<sup>137</sup> Today no one suggests that Israel is resolving its terrorism problem in the way that the British, Germans, or Italians have done.<sup>138</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1684.

<sup>136</sup> This was the finding of the Human Rights Committee in 2003. See Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Israel*, para. 18, U.N. GAOR 78th Sess., U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003). Bowden cites an Israeli human rights activist who confirms that torture did not end after the 1999 Public Committee decision. Bowden, *supra* note 8, at 76.

<sup>137</sup> Bowden, *supra* note 8, at 76.

<sup>138</sup> Early indications from the Iraq conflict are consistent with these observations. We know that when the media began reporting on U.S. use of torture and coercion of detainees in Iraq, insurgent groups cited the abuse as a reason for their own acts of violence. In May 2005, anti-American rioting broke out in four countries resulting in the deaths of as many as seventeen people. The anger was triggered by a *Newsweek* story that interrogators at Guantanamo Bay, Cuba, had flushed a Koran down a toilet. *Newsweek* formally “retracted” the story when the magazine’s sole anonymous source refused to confirm it following publication—and following the rioting. The story had been credible to *Newsweek* given the considerable evidence that the United States has used unlawful interrogation methods, including some that exploit an interogee’s Muslim faith. Around the Muslim world, the Bush Administration’s denial of this one incident was little believed, again owing to the widespread knowledge that unlawful techniques have been used against Muslims. See Katharine Q. Seelye & Neil A. Lewis, *Newsweek Says It Is Retracting Koran Report*, N.Y. TIMES, May 17, 2005, at A1. The Administration

### B. *Enforcement of International Law*

Bowden asserts in his article that international law is unenforceable, and he implies that it may therefore be ignored.<sup>139</sup> This observation is factually incorrect and ignorant of the nature of law. The binding nature of law—all law—is not assessed based on the number of enforcement actions brought in response to law violations.<sup>140</sup> Nevertheless, international law does have means of enforcement and those means are generally similar to the means available in national legal systems. The primary difference is that international society does not have a dedicated police force at its disposal. Rather, states use their own police forces to enforce international law, unilaterally or collectively, and occasionally specialized forces are organized for particular purposes. States and international organizations also enforce international law through military force, sanctions of all kinds, and through international and national courts.

International law of the type discussed in this Article concerns the legal duty of nation-states to exercise due diligence in ensuring that their personnel use only lawful methods of interrogation. Where a state fails in this duty, other states can hale them before international courts and tribunals, such as the case brought by Denmark, Norway, Sweden, and the Netherlands against Greece for peacetime torture, the case brought by Ireland against Britain for peacetime cruel, inhuman, and degrading treatment, and Ethiopia's case against Eritrea for wartime torture and coercion.<sup>141</sup> States can be scrutinized and called into compliance by human rights monitoring bodies, as the United States has been by the Inter-American Commission on Human Rights

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promised to respect the holy Koran, but failed to commit to full compliance with international law respecting interrogation, including full access to detainees by the ICRC. In this author's view, it will only be when such a promise is made—and kept—that the United States will begin to regain a modicum of respect in the Muslim world. Compliance with international law following September 11 would have saved us from this current costly and shameful situation.

<sup>139</sup> Bowden, *supra* note 8, at 56.

<sup>140</sup> See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (1961). For discussions of the nature of international law and why nations obey, see LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979); see also, Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997).

<sup>141</sup> See *supra* notes 63, 71–82 and accompanying text.

regarding Guantanamo Bay.<sup>142</sup> They may be subjected to sanctions—a choice that the United States has particularly advocated over the years.<sup>143</sup>

In addition, where a state fails to enforce international law against its own citizens, other states are increasingly stepping in to hold individuals accountable. The Geneva Conventions, as discussed above, mandate that those guilty of grave breaches be held accountable before the courts of any of the 190 parties.<sup>144</sup> An Italian prosecutor issued indictments for nineteen CIA officers in the summer of 2005, charging that they kidnapped a Muslim cleric and took him to Egypt where he says he was tortured.<sup>145</sup> A number of states will prosecute international crimes, such as torture, regardless of the nationality of the suspect, victim, or place of the crime. Criminal complaints under such laws have been filed by citizens in Chile and Germany against Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, and others for the abuse of detainees in Iraq, Afghanistan, Guantanamo Bay,

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<sup>142</sup> Precautionary Measures in Guantanamo Bay, Cuba, Inter-Am. C.H.R. (Mar. 13, 2002), *available at* <http://www1.umn.edu/humanrts/iachr/guantanamomeasures2002.html>, *cited in* Diane Marie Amann, *Guantanamo*, 42 COL. J. TRANS. L. 263, 276 n.48 (2004).

<sup>143</sup> For a review of major sanctions programs instituted by the Security Council to respond to human rights violations and other breaches of international law, see Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT'L L. 63 (2002).

<sup>144</sup> See *Dir. of Pub. Prosecutions v. T*, Eur. High Ct. 3d Div. 1994 (Den.) *excerpted in* O'CONNELL, *supra* note 26, at 558 (the Danish prosecuted a Croatian in Denmark on an asylum visa for grave breaches of the Geneva Conventions in the beating of POWs in Bosnia). See also Neil A. Lewis, *Military's Opposition to Harsh Interrogation is Outlined*, N.Y. TIMES, July 27, 2005, at A21 for the views of top U.S. military lawyers that persons using unlawful techniques could face prosecution in various courts:

General Rives added that many other countries were likely to disagree with the reasoning used by Justice Department lawyers about immunity from prosecution. Instead, he said, the use of many of the interrogation techniques "puts the interrogators and the chain of command at risk of criminal accusations abroad." Any such crimes, he said, could be prosecuted in other nations' courts, international courts, or the International Criminal Court, a body the United States does not formally participate in or recognize.

*Id.*

<sup>145</sup> Ian Cobain, *CIA Terror Flights: Destination Cairo: Human Rights Fears Over CIA Flights: Snatched Suspects Tell of Torture: UN Investigator to Look at British Role*, GUARDIAN, Sept. 12, 2005, at 13. Germany, Denmark, Sweden, and Austria have launched official investigations or taken other measures in response to use of their airspace by the CIA for rendition of persons to places where they may face torture. See *id.*; see also *Germany Investigates Alleged CIA Abductions*, COLS. DISPATCH, July 22, 2005, at A11.

and at undisclosed locations.<sup>146</sup> Furthermore, civil actions may be brought for compensation when rights are violated. Two such actions have already been filed in the United States by victims of torture and abuse at the hands of Americans.<sup>147</sup> More legal action can be expected, given the position taken in many countries that their courts have jurisdiction over torture, coercion, cruelty, and abuse during interrogation in war and peace.<sup>148</sup>

#### IV. CONCLUSION

Whether a combatant or a civilian criminal suspect, those detained by the United States in its so-called war on terror have certain inalienable rights. Likewise, the United States government, its military and agencies, and those working under its control have specific legal obligations that form a framework within which individuals can be detained. Neither wishful legal analysis nor creative classification of detainees relieves the government of its responsibilities. While there is no treaty, law, or regulation prohibiting the interrogation of prisoners and detainees, such interrogation must be carried out in a manner consistent with law, both domestic and international. Anyone authorizing, supervising, or conducting interrogations in which illegal techniques are used should be held accountable in accord with the international ban on coercive interrogation. In complying with the law, the United States will find its best chance of triumphing over terrorism not in the

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<sup>146</sup> For details regarding the complaints filed in Germany, see the website of the Center for Constitutional Rights, Docket: Center For Constitutional Rights Seeks Criminal Investigation in Germany into Culpability of U.S. Officials in Abu Ghraib Torture, [http://www.ccr-ny.org/v2/legal/september\\_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472](http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472) (last visited Nov. 22, 2005).

<sup>147</sup> Human Rights First and the American Civil Liberties Union have brought a civil suit on behalf of victims of torture against Donald Rumsfeld, George Tenet and others. See Michael Posner Executive Director, Human Rights First, The Case Against Rumsfeld (Mar. 1, 2005), [http://www.humanrightsfirst.org/us\\_law/etn/lawsuit/statements/lit-posner-030105.htm](http://www.humanrightsfirst.org/us_law/etn/lawsuit/statements/lit-posner-030105.htm). The Center for Constitutional Rights and human rights lawyers have brought a RICO action on behalf of victims of torture against two private contracting firms that supplied interpreters and contractors to the U.S. government. See Center for Constitutional Rights, CCR Files Lawsuit Against Private Contractors for Torture Conspiracy, <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=cBct36Qkps&Content=401> (last visited Nov. 22, 2005).

<sup>148</sup> For a discussion of jurisdiction over the crime of torture, see James Thuo Gathii, *Torture, Extraterritoriality, Terrorism and International Law*, 67 ALBANY L.R. 335 (2003).

narrow sense of stopping every attack, but in the larger sense of remaining a society worth defending from terrorism.

